that of the New York court. The Michigan statute provides: "Any employer who has to pay compensation as hereinafter provided shall not be subject to any other liability whatsoever, save as herein provided, for the death of, or personal injury to, any employee, for which death or injury compensation is recoverable under the act." [6]

This question can never arise in the great majority of states, due to the express provision in the acts that the compensation provided for shall be the exclusive remedy for all injuries arising out of and in the course of the employment. The Pennsylvania Act provides: "Such agreement [to accept the provisions of the act] shall operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of the employment or to any method of determination thereof, other than as provided in . . . this act." [7] The Connecticut Act provides: "The acceptance of this act by employers and employees shall be understood to include the mutual renunciation and waiver of all rights and claims arising out of injuries sustained in the course of the employment as aforesaid, other than rights and claims given by . . . this act." [8] The Minnesota Act is also a good example of the "exclusive remedy" clause as it should be drawn. [9]

P. C. W.

SURETYSHIP—WILL ADVANCE PAYMENTS DISCHARGE A SURETY?—A problem interesting theoretically, and practically of much importance, recently came before the highest court of Maine. While the facts of the case are by no means novel, being typical of several cases which have arisen under building contracts, in view of the somewhat confused state of the law on the subject, considerable importance attaches to the decision. The defendant had become surety on a bond given by a contractor to secure the performance of two construction contracts. By the terms of the contracts the contractor was to be paid on the fifteenth day of each month for the estimated value of the work done during the preceding month, less fifteen per cent of the amount, which was to be retained by the owners until the completion of the undertaking. Without the surety's consent a payment of five thousand dollars was made by the owner to the contractor twenty-one days in advance of the time when, under the contract, it became due. On the date when the payment was made, however, work exceeding in value the amount advanced, had been performed by the contractor since the last regular payment. It was

[6] Public Acts of Michigan, Extra Session of 1912, No. 10, part 1, § 4.

[7] Act of June 2, 1915, Laws of 1915, p. 736 (Pa.).

[8] Conn. Laws of 1913, c. 138, part B, § 1.

[9] Minn. Laws of 1913, c. 467, part 1, §§ 9 & 10. See also 102 Ohio Laws, p. 528 (1911); Wis. Stat. of 1911, c. 110 a, § 2394-4.

held that the alteration of the contract was not material, and that the surety was not thereby discharged.[1]

A difficulty in the decision of this class of cases frequently arises from the fact that in many cases equities apparently equal arise simultaneously in favor of the owner and of the surety. An advance payment by the owner to the contractor, by itself, undeniably removes one of the incentives which the contractor has to pursue his contract to completion, and thereby prejudices the rights of the surety. On the other hand, an advance payment may enable a contractor, especially if he be hard pressed financially, to complete or continue a contract which he must otherwise abandon, and thereby enure to the benefit of the surety. Such a situation came before the court in *Calvert* v. *London Dock Company*,[2] the leading authority upon the rights of sureties in building contracts. It was there urged that the advances made it possible for the contractor, who was handicapped by lack of funds, to complete a greater portion of the work than he could otherwise have done. The court held that the fact that the advances were calculated to benefit the sureties was immaterial, and the surety was discharged.[3]

It is interesting to examine the only authority to which the court in the case under discussion refers as directly sustaining its decision. In that case[4] one thousand dollars had been paid to the contractor before such payment was due, but at a time when work to the value of three thousand dollars had been performed by the contractor since the last payment. A week later the contract was abandoned. Mr. Justice Chase said that while the payment was without reference to the contract and there was therefore no alteration of the contract itself, a mere advance payment might be an act so antagonistic to the interests of the surety as to relieve him from further obligation on his contract. He then continued: "It was not made simply as a loan for the benefit of the owner and the defendant in case of a failure on the part of the contractors to complete their work. . . . The payments made cannot, under any view that can be taken of them, be said to remove in any degree the incentive that the contractors had prior thereto for completing the contract."

That the owner in such a case should be permitted to lend money to the contractor in an entirely independent transaction, unconnected with the construction contract, without discharging the surety is conceded, and it is so held.[5] But when the owner, as in this

[1] Maine Cent. R. R. Co. v. National Security Co., 94 Atl. 929 (Me. 1915).

[2] 2 Keen 638 (Eng. 1858).

[3] Since this case the broad general rule is laid down by text writers that advance payments to the contractor in a building contract discharge the surety. Brandt: Suretyship and Guaranty, 3rd ed., vol. I, § 439; Childs: Suretyship and Guaranty, p. 166.

[4] St. John's College v. Aetna Indemnity Co., 201 N. Y. 335 (1911).

[5] Meyer v. Bichow, 133 La. 975 (1913).

case, advances money which is to be used in the furtherance of the contract by the contractor and intends to charge the amount against the contractor in his next payment, it is submitted that the line between such a loan and an advance is rather finely drawn. It is true that by the application of the amount to the purposes of the contract, the surety is relieved *pro tanto,* and thereby benefited, but it is, nevertheless, an advance, and the subterfuge in calling it a loan, should not prevent the rule from applying.[6]

The reason advanced in such cases for not discharging the surety is that as the work performed exceeds in value the amount advanced, the inducement to the contractor to complete the work remains. But this does not necessarily follow. If one conceives a case where the contractor is finding his contract unprofitable, he might well be tempted to discontinue by an advance payment of an installment not yet due. The mere fact, therefore, that the owner, even after the advance is made, remains debtor to the contractor, as he did both in the New York case and the one under discussion, is not conclusive that the inducement of the contractor to complete his contract was not impaired or diminished by such payment. Furthermore, if an advance under such circumstances does not constitute a material alteration of the contract, if it is used in the furtherance of the work and is therefore beneficial to the surety, it would seem that logically the surety should be liable for the amount advanced, inasmuch as it is not in such case tantamount to the surrender of a security. But both the case under discussion and the New York case[7] held that the surety in any event was relieved *pro tanto* to the extent of the unauthorized advance.[8]

The test as to what constitutes a "material variance" under such a contract has been held to be whether it substantially increased the chances of the loss incurred against. "It is not a question whether the variance actually caused the breach of the bond; but whether it was such a variance as a reasonably careful and prudent person undertaking the risk would have regarded as substantially in-

[6] In Wells v. National Surety Co., 222 Fed. 8 (1913), the court sought out the real nature of such a contract. There a contractor to aid a bonded sub-contractor executed his accommodation note to the sub-contractor, it being understood that the contractor should "protect himself" out of the proceeds which should become payable to the sub-contractor under the contract. The court said that the effect of the note transaction was to anticipate payments as completely as though the owner had advanced money, with the understanding that it was to be so repaid. "This deprived the surety of the protection and the incentive of restricted payments, and was just as prejudicial as if the advance were less disguised."

[7] *Supra,* note 4.

[8] But in Fitger Brewing Co. v. American Bonding Co. of Baltimore, 149 N. W. 539 (Minn. 1914) it was intimated that the surety would be relieved only to the extent that it was damaged by the excess payment. If the excess was employed in the furtherance of the contract, this damage would obviously be *nil.*

creasing the chances of loss." [9] This rule of foresight seems to have been lost sight of in some of the decisions.[10]

In ordinary cases of suretyship the early rule of *strictissimi juris,* according to the great weight of authority, still prevails.[11] A number of modern decisions, inconsistent with this rule, are based upon an entirely different principle, which has been stated thus: "The doctrine that a surety is a favorite of the law, and that a claim against him is *strictissimi juris* does not apply where the bond or undertaking is executed upon a consideration by a corporation organized to make such bonds or undertakings for profit. While such corporations may call themselves 'surety companies' their business is in all essential particulars that of insurance." [12] That one of the reasons, at least, for giving a gratuitous surety the benefit of the rule of *strictissimi juris* is absent in the case of sureties for consideration, is undisputable. Such a surety is no longer one who "assumes the burdens of the contract without sharing its benefits" and possibly may not come within the principle that "an innocent surety is always a favorite subject of legal protection," but whether he ought to be permitted, notwithstanding the fact that he receives consideration, "to prescribe the exact terms upon which he will enter into an obligation, and to insist upon his discharge if those terms are not observed" may be another question.[13] It is in this branch of the law that, owing to a failure to distinguish sharply between the situation of surety companies which become surety for profit and individuals who occasionally lend their credit gratuitously, there is much uncertainty and confusion. For example, while both in the case under discussion and the New York case [14] the defendants were companies engaged in becoming surety for profit, in neither of

[9] Stewart, J., in Young v. American Bonding Company of Baltimore, 228 Pa. 373 (1910).

[10] In Loughney v. Huntsman Construction Co., 63 Pitts. 171 (Pa. 1913), a recent lower court decision in Pennsylvania, where notes were given in advance, the court held that the surety was not discharged because the owner withheld twenty per cent. of the amount payable which he was not required to do under the contract, and because "the latest of the notes in question was paid a long time before the default, it does not appear how there could be any material injury, or any injury whatever to the defendant by reason of the payment." *Non constat,* however, that *at the time the advance was made,* the risk was not increased thereby.

[11] Board of Commissioners of Morgan County v. Branham, 57 Fed. 179 (1893). In Blackburn v. Morel, 79 S. E. 492 (Ga. 1913), Russel, J., said: "The liability of a surety is *stricti juris,* and cannot be extended; and a surety is relieved by any act which tends to increase his risk; and whether in fact there is an increase of his risk or not, there is a breach of the contract."

[12] Young v. American Bonding Co., *supra,* note 9. See also Brandt: Suretyship, 3rd ed., vol. 1, § 15; Pingrey: Suretyship, 2nd ed., § 442.

[13] Quotations are from opinion of Baker, J., in Board of Commissioners v. Branham, *supra,* note 11.

[14] *Supra,* note 4.

the opinions is this given as the reason for the decision, nor is the fact that the defendants are such companies especially emphasized. If based upon this rather widely acknowledged exception in the case of such companies, the decisions are entirely proper as the alterations in both cases might possibly be construed as immaterial. But if, as the language of the decisions would indicate, they attempt to lay down a broad rule applicable to sureties generally, it is suggested that they represent a departure from the rule of *strictissimi juris* which is not sanctioned by the weight of authority.[15]

Whether or not the exception depriving the surety for hire of some of the defenses of the gratuitous surety is justified on principle, the rule laid down by the Pennsylvania court at least possesses the merit of definiteness. That court has said: "The trend of all our modern decisions, federal and state, is to distinguish between individual and corporate suretyship where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case the rule of *strictissimi juris* prevails as it always has; with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance." [16]

The rule in the federal courts is less certain. In *Supreme Council* v. *Fidelity and Casualty Company of N. Y.*[17] the court apparently adopted the exception in the case of sureties for hire. But in a recent case [18] the court said: "The advancements are so large and substantial that it may be accepted as self evident that the alteration by the plaintiff proved prejudicial to the surety, *if such showing should be deemed important*." [19] This would appear to cast some doubt upon the present attitude of the federal courts.

It is submitted that the existing confusion in the law on this subject is due either to a failure to distinguish sharply the exception in the case of a paid surety or to a reluctance to admit that such a

[15] *Supra*, note 11. In Fitger Brewing Co. v. American Bonding Co., *supra*, note 8, the surety was held discharged under similar circumstances, it not being stated that the decision was based upon the receipt of compensation by the surety. In the New York case, *supra*, note 4, the court said: "The rule . . . ought not to be extended beyond the reason for the rule, particularly when the surety is engaged in the business of becoming surety for pay and presumably for profit." Thus here no clear conception is apparently made in the case of sureties for hire. In the case under discussion no reference to the receipt of compensation by the surety was made.

[16] Stewart, J., at p. 380, in Young v. American Bonding Co., *supra*, note 9. See also Fels & Co. v. Mass. Bonding & Insurance Co., 48 Pa. Super. Ct. 27 (1911).

[17] 63 Fed. 48 (1894).

[18] Justice v. Empire State Surety Co., 218 Fed. 802 (1914).

surety and a gratuitous surety stand on substantially different grounds. There is much to be said in favor of the certainty of the Pennsylvania rule in this regard. Whether logically there is any reason for the exception is another matter. It seems only just that, where a surety company inserts in its contract an elaborate list of questions, which the obligee is to answer, and the answers to which become warranties by the terms of the contract, thereby forming what is to all practical purposes an insurance policy, the privileges incident to a contract of suretyship should not attach.[20] But where the surety merely receives a compensation for his risk, and his contract is not essentially different from that of a gratuitous surety, it is suggested that the same rule ought to be applied to both. It is true that in the former situation his identity as an innocent bystander with no opportunity for profit and a liability to suffer loss disappears.

There are some who would assail the rule of *strictissimi juris* itself as a principle wholly without justification in modern law. However that may be, it is submitted that while such a rule exists in favor of technical sureties who act gratuitously, a true surety, even if acting for compensation, should be able to contract with reference to it; [21] and that an exception predicated solely upon the receipt of compensation and not upon any inherent difference in the contract entered upon, is without justification.

B. M. K.

[19] Italics not found in the original.

[20] Brandt: Suretyship and Guaranty, 3rd ed. vol. 1, § 15.

[21] See Guaranty Co. v. Pressed Brick Co., 191 U. S. 416 (1903).